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No. 93-912

*In The*

# Supreme Court of the United States

**October Term, 1993**

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,

*Petitioners,*

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Wisconsin Supreme Court**

## REPLY OF PETITIONERS TO THE NON-MDL RESPONDENTS

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## REPLY OF PETITIONERS TO THE NON-MDL RESPONDENTS

The non-MDL respondents, like the MDL 633 respondents, have provided this Court with no assistance "in the exercise of its discretionary jurisdiction" (Rule 15.1) with respect to the merits of this case. Implicitly, they too concede this case presents an important conflict in the application of the rule of *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), one whose resolution by this Court would clarify the relationship of modern systems of partial deregulation to antitrust damage claims on behalf of consumers who are victims of unlawful price fixing. They dispute only this Court's jurisdiction to reach these significant questions.

### A. The Decision Below Merits Review

Petitioners have set forth several compelling and undisputed reasons why this court should grant the Writ of *Certiorari:*

1. There is a clear conflict between the Wisconsin court's decision and the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) as to the application of *Keogh* to Wisconsin title insurance.

2. The conflict presents a very important, general question of appropriate standards for applying the *Keogh* rule to various kinds of non-ICC regulatory regimes.[1]

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[1] Heretofore, application of *Keogh* required that there must be a filed rate that the regulatory regime has made the only rate that may legally be charged. Yet in Wisconsin, the system of "use before file" insurance regulation allows, indeed encourages, insurers to change rates freely in response to competitive market forces. Thus, there never is a rate which insurers must charge until they obtain regulatory approval for a change in

3. Wisconsin's failure to provide active regulatory supervision of the insurers' rate setting, as found by this Court in *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992), presents the additional question of whether *Keogh* should ever bar a damage claim when no regulatory supervision existed. *See Brown* and the dissenting opinion in the lower court in this case. Pet. App. 14-15.

Petitioners also note that even if this Court decides *Brown* in favor of the plaintiffs in that case, the Wisconsin victims of the respondents' unlawful price fixing will not have a full and adequate remedy because of *Brown's* much narrower scope; i.e., the defendants named in *Brown* do not include the six non-MDL respondents here, the conspiracy in *Brown* is of much shorter duration, and it is limited to title insurance services. *See* Pet. 4-5.

**B. The Court Has Jurisdiction in This Case**

The non-MDL respondents, like the MDL 633 respondents, have claimed that this Court lacks jurisdiction to review this decision because the Wisconsin court followed state, not federal, law. But they cannot point to any "plain statement" to that effect in the court's opinion. Therefore, they try to explain away the Wisconsin court's express holding that the construction of Wisconsin antitrust law "is controlled by federal decisions . . . . " (Pet. App. 8), by reference to that court's use of the phrase "adopt the reasoning" in connection with its discussion of *Keogh*. Brief of Non-MDL Respondents 6. In fact, both of these phrases appear in the same passage of the opinion (Pet. App. 8), and respondents do not attempt to reconcile their combined use. Absent a clear statement from the

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rates. Pet. 16-19; 24-25; Pet. App. 20-21. Moreover, Wisconsin insurance law does not provide for refunds to buyers if rates are excessive. Pet. 19, 23 n.16.

Wisconsin court of an independent and adequate state law ground for its decision, the more plausible conclusion (especially in light of that court's reliance earlier in its opinion on the general federal law of filed tariffs) is that it believed that, since every case is different, a subsequent case is not "controlled" by another unless and until the court concludes that the similarities are such that it must "adopt the reasoning" of the earlier decision for application to the instant case. The totality of the passage, therefore, is consistent with the conclusion that the lower court "decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

The non-MDL respondents also point to references in the opinion to Wisconsin cases on filed tariffs. Brief of Non-MDL Respondents 7. But they do not address the grounds of those decisions (*See* Reply of Petitioners to the MDL 633 Respondents 4-5, discussing the federal law basis of the most recent of the state cases) and fail to explain why the Wisconsin court drew its definition of the filed tariff doctrine from the decisions of this Court which restricted the application of state law in filed tariff contexts. *Id.*

Respondents also ignore the fact that the lower court went on at considerable length to squarely reject petitioners' arguments that *Keogh* and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) do not apply. Pet. App. 8-11, 12-13. Nothing in its discussion of those cases would lead one to believe that the court was, as respondents' claim, merely "look[ing] to *Keogh* and *Square D* for guidance in interpreting state antitrust law." Brief of Non-MDL Respondents 7. Instead, the court found petitioners' damage claims to be barred "[u]nder the filed rate doctrine as enunciated in *Keogh* . . . . " Pet. App. 11.

In *Michigan v. Long*, this Court rejected as unworkable and undesirable its previous, "ad hoc" methods of divining the basis of ambiguous state court decisions which interwove federal and state law in reaching their results. 463 U.S. at 1038-41. The plain statement rule created a clear standard by which this Court would determine its jurisdiction from the clarity of the state grounds expressed within the four corners of the opinion below, not from an independent examination of state law. *Id.* Thus, assuming *arguendo* some ambiguity whether the decision below is grounded in federal law, the labored effort of the non-MDL respondents to argue an independent state grounds is self-defeating. It demonstrates there is "good reason to question whether there is an independent and adequate state ground for the decision;" in such cases, a "conclusive presumption" in favor of this Court's jurisdiction arises. *Coleman v. Thompson*, 111 S.Ct. 2546, 2555, 2559 (1991).

The respondents also deny jurisdiction based on a claim of a purely state law basis on which the case might have been decided. Brief of Non-MDL Respondents 8-9. This argument is inconsistent with the plain statement rule and also with *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973):

> The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law *does not create an adequate and independent state ground* that relieves this Court of the necessity of considering the federal question.

410 U.S. at 630-31 (emphasis added). This rule avoids the danger of validating a state court decision that might have been decided differently if the lower court were not laboring under an erroneous understanding of federal compulsion. *Id.* Application of the *United Air Lines* rule is particularly appropriate here because, as explained in the

Reply of Petitioners to MDL 633 Respondents 6-7, once the compulsion of *Keogh* and *Square D* are removed, there is no way to harmonize this decision with prior Wisconsin law.

Finally, we reiterate that the Wisconsin court's reliance on a highly expansive interpretation of *Keogh* to insulate a group of law breakers from state-law-based accountability to the victims of their private actions presents an important challenge to this Court's recent efforts to ensure the relative autonomy of state and federal legal regimes. *See* Reply of Petitioners to MDL 633 Respondents 7-10.

## CONCLUSION

For the reasons set forth in our Petition, undisputed by either set of Respondents, we urge that the petition be granted.

Respectfully submitted,

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